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BEFORE THE ARIZONA CORPORATIO
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2012 DEC 26 P 3:12

AZ CORP COMMISSION
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In the matter of:

**ANDREW C. MENICHINO, an married
individual,**

**INNOVATIVE CONSTRUCTION, INC., a
Pennsylvania Corporation, and**

**ATLANTIC LEXUS, LTD, a Turks and
Caicos Corporation,**

Respondents.

DOCKET NO. S-20839A-12-0083

**RESPONDENTS' MOTION TO ALLOW
TELEPHONIC TESTIMONY**

Arizona Corporation Commission

DOCKETED

DEC 26 2012

DOCKETED BY

Respondents Andrew C. Menichino; Innovative Construction, Inc.; and Atlantic Lexus, Ltd. (collectively "Respondents"), through undersigned counsel, hereby respectfully request that they be allowed to present telephonic testimony of Andre Forgues. Respondents make this motion for three reasons, (1) Mr. Forgues is a Canadian resident and neither Respondents nor the Commission have the power to compel him to travel to Arizona to testify; (2) upon information and belief, Mr. Forgues' passport is currently expired and so he does not currently have valid travel documents and therefore will be unable to travel to the United States for the hearing and (3) it is anticipated that Mr. Forgues' testimony will be short, and the expense of travel would be substantial and would likely result in an undue burden.

This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Menichino is alleged to have engaged in securities fraud, among other securities violations. Throughout the Notice of Opportunity for Hearing Regarding Proposed Order to Cease

1 and Desist, for Restitution and for Administrative Penalties (the "Notice"), the Division alleges the
2 existence and conduct of a "Mr. AF." Specifically, the Division alleges that Mr. Netzel met Mr.
3 AF who discussed an investment that would pay approximately five percent monthly and that Mr.
4 AF is a Canadian resident. Notice at ¶6. The Division further alleges that Mr. AF and/or Mr.
5 Menichino made representations regarding certain UCC liens and that such liens would be used as
6 collateral. *Id.* at ¶¶9-10.

7 Mr. AF is Andre Forgues and he is indeed a Canadian resident currently residing in
8 Canada. Mr. Forgues' testimony is essential in this matter and is, in fact, likely to be exculpatory
9 in many respects to the allegations made against Mr. Menichino. It is anticipated that Mr. Forgues
10 will testify regarding his involvement in the transactions at issue including the numerous
11 conversations he had with Mr. Netzel. Mr. Forgues is also expected to testify regarding the limited
12 role Mr. Menichino played in the transaction. Given the importance of Mr. Forgues' testimony, it
13 is critical that he be allowed to testify telephonically. Mr. Forgues' testimony will likely last at
14 least one hour but likely no more than no more than two hours.

15 Not only are Respondents and the Commission without the power to compel Mr. Forgues
16 to travel to the United States to testify, but upon information and belief, Mr. Forgues does not have
17 current and valid documents required for international travel and he does not have time to get an
18 updated passport before the hearing. Thus, his travel to the United States is virtually impossible.

19 **II. LAW AND ARGUMENT**

20 As acknowledged by the Division in its request to allow telephonic testimony of Lawrence
21 Tucker, the use of telephonic testimony is permissible in administrative proceedings. *T.W.M.*
22 *Custom Framing v. Industrial Comm'n of Arizona*, 198 Ariz. 41, 6 P.3d 745 (Ct. App. 2000).
23 Further, telephonic testimony is an "appropriate alternative" to live in-person testimony. *Ariz.*
24 *Dept. of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (Ct. App. 1997). The
25 fundamental issue of utmost importance is the due process requirement of the opportunity to be
26 heard.

1 Telephonic testimony of Mr. Forgues will preserve Respondents' opportunity to be heard.
2 Unlike Mr. Tucker, live testimony of Mr. Forgues requires him to travel internationally.
3 International travel requires a valid passport and Mr. Forgues' passport is, upon information and
4 belief, currently expired. To deny Respondents' request would be to deny their due process rights
5 because of the impossibility of Mr. Forgues being able to get into the United States.

6 In addition to the impossibility of international travel, requiring Mr. Forgues to travel to
7 Arizona for an hour or two of testimony would result in a substantial hardship given the cost of
8 such travel. The only remedy then is to allow Mr. Forgues to testify telephonically.

9 Respondents' request for telephonic testimony differs drastically from that of the
10 Division's request regarding Mr. Tucker. While Respondents' objection to Mr. Tucker's
11 testimony will be detailed in their response to the Division's motion, a few points are worth noting
12 here. First and foremost, Mr. Tucker submitted a sworn affidavit alleging that Mr. Menchino
13 committed a forgery. That allegation alone warrants in-person testimony so that Mr. Tucker's
14 credibility can be properly judged. Mr. Forgues, on the other hand, is expected to testify regarding
15 things already known and alleged by the Division, including, but not limited to, his conversations
16 with Mr. Netzel, his participation in the transactions at issue and Mr. Menichino's lack of
17 participation. Mr. Forgues' testimony is further expected to rebut and clear up numerous
18 allegations made against Mr. Menichino, namely those allegations wherein the Division combines
19 conducted by Mr. Forgues and/or Mr. Menichino, for example, paragraphs 9, 10 and 14 of the
20 Notice.

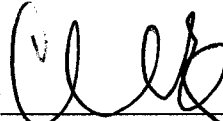
21 **III. CONCLUSION**

22 Respondents are entitled to their day in court and are entitled to be heard. It is their
23 fundamental right of due process to present witnesses on their own behalf. Requiring Mr. Forgues
24 to travel is not only a hardship but an impossibility given the fact that he, upon information and
25 belief, does not have the necessary travel documents. Accordingly, denying Respondents' request
26 will effectively deny them their due process right to be heard. In order to preserve Respondents'
27 due process right to be heard, Mr. Forgues must be allowed to testify telephonically.

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RESPECTFULLY SUBMITTED this 26th day of December, 2012.

BADE BASKIN RICHARDS PLC

By 

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1 ORIGINAL and thirteen copies of the foregoing
2 filed this 26th day of December, 2012 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 this 26th day of December, 2012 to:

9 Matthew J. Neubert
10 Paul Huynh
11 Director of Securities
12 Securities Division
13 Arizona Corporation Commission
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